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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN D. MAGEE,

Defendant and Appellant.

D070296

(Super. Ct. No. SCD247302)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Judge. Affirmed.

Andrea S. Bitar, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Brian D. Magee appeals after he pleaded guilty to one count of voluntary manslaughter (Pen. Code,¹ § 192, subd. (a)) and to seven counts of

¹ All further statutory references are to the Penal Code.

felony child abuse (§ 273a, subd. (a)), after being charged by amended information with the murder of his infant son, victim Brian D. Magee, Jr. (Brian Jr. or child), (§ 187, subd. (a); count 1); assault on a child likely to produce great bodily injury, resulting in death (§ 273ab, subd. (a); count 2); and seven counts of felony child abuse (§ 273a, subd. (a); counts 3-9). Affirmed.

OVERVIEW²

Defendant and his then girlfriend, Tia Compton, had two children together, including Brian J. who was born on October 25, 2012. At the time of the homicide in December 2012, defendant was taking care of both children after Compton had been evicted from a residence where the couple rented a room.

On December 9, 2012, defendant's mother drove defendant and his two children to their residence. Before leaving, defendant's mother put Brian J. to bed. Around 8:00 p.m., Brian J. woke crying. Defendant gave the child a bottle and put him back to bed. Defendant went to bed some time later. Around midnight, Brian J. began crying again. Defendant tried to feed Brian J., but the child was still unhappy. Ultimately, the child calmed down after defendant gave him a pacifier. Defendant then placed the child face up on the bed.

Around 7:20 a.m. the next day, after the owner of the residence had left, Compton arrived to see her two children. When defendant went over to Brian J., he immediately noticed the child was lying face down on the bed. Defendant picked up Brian J. and

² This overview is derived in part from the April 12, 2016 probation report.

found the child's coloring was purple. Defendant called 911 and began administering CPR. Brian J. was transported to the hospital, where he was pronounced dead. At the hospital, Brian J. already had some lividity and a "very low" body temperature, indicating the child had been deceased for a little while. In addition to some scratches on his neck and under his chin, Brian J. had a quarter-sized bruise near his eye.

On investigation, defendant told San Diego police detectives that the scratches on Brian J. had been caused by a "zipper on a onesie about two weeks earlier" and that Compton had not had any contact with the children for two days. In response to why defendant had what appeared to be "fresh injuries to his fist and knuckles," defendant claimed to have punched a wall while on the phone with the 911 dispatcher. Detectives, however, saw no noticeable damage to any of the walls.

An autopsy was performed on Brian J. on December 11, 2012. The medical examiner found that Brian J. had sustained "two healing fractures of [the] right posterolateral 5th and 6th ribs"; that there were signs that the rib fractures were healing, indicating the injuries had occurred in the last several days "if not weeks"; that Brian J. had a skull fracture near the crown and subdural bleeding in the brain, indicating the injury had been inflicted recently; that he had "acute bilateral optic nerve sheath hemorrhages, acute left retinal hemorrhage, and healing sub-retinal pigment epithelium hemorrhage"; that the healing hemorrhage indicated "prior head trauma"; that on his arms, he had a "healing fracture of his mid[-]right radius and a healing fracture of his distal right radius"; and that, collectively, these injuries indicated Brian J. had endured

"long-term abuse." The medical examiner determined the cause of death was "blunt force head trauma" and the "manner of death was homicide."

Homicide detectives interviewed Compton, who denied hurting the child. Compton also denied seeing any injuries on Brian J. other than the neck scratches. Compton did not believe that defendant would harm the child.

The following day, detectives interviewed defendant. He denied hurting Brian J. and instead described how he cared for the child. On questioning, defendant stated the bruise over the child's eye had occurred a week earlier when the child hit his head on the car seat handle as defendant was picking up the child. When asked what he thought had happened to the child, defendant stated he believed the child had suffocated. Defendant had no explanation as to why the child had broken bones but suggested it could have occurred while he was performing CPR.

In mid-April 2013, detectives arrested defendant and charged him with the murder of Brian J. After being admonished, defendant agreed to speak with detectives. During the interview, defendant denied harming the child. Defendant admitted he had become frustrated with the child, noting when he picked up the child (then about two months old), he " 'tried to talk to [the child]. [He] asked him, why are you crying? What do you want? [He] told him to please stop crying.' " Defendant stated his tone with the child had been "loud, but not aggressive." Defendant also stated that he " 'never purposely hurt him' "; that he "didn't hit [the child's] head on anything"; that his daughter (who was about a year older than Brian J.) " 'didn't do it' "; and that he merely " 'changed him, gave his [h]is

binky and he stopped crying.' "

The record shows in February 2016, defendant pleaded guilty as noted *ante*. The record further shows that before doing so, defendant was sworn in; that defendant testified he reviewed the amended information with his attorney; that defendant himself read and understood the amended information; that the court informed defendant, and that defendant confirmed he understood, the charges added in the amended information were all "determinate-sentence charges whereas the two charges that were set forth in the original information were life-top [charges]"; that defendant admitted placing his initials in the boxes on the change-of-plea form and signing his name on the back of that form; and that defendant understood the terms of his guilty plea and had an opportunity to talk to his attorney "about [his] case."

The record shows the court asked defendant's attorney if defendant's plea was in defendant's best interests, and defendant's attorney agreed it was. Next, the court reviewed the change-of-plea form with defendant. The court noted defendant was agreeing to plead guilty to one count of voluntary manslaughter, a lesser included offense of count 1; and to seven counts of felony child abuse.

The court noted there was an addendum attached to the plea form, which provided as follows:

" I [i.e., defendant] am stipulating to a determinate sentence of 20 years and four months' in 'prison and that all the counts that I'm pleading guilty to' to 'be run consecutively to each other.[']

" 'The total sentence of 20 years and four months prison is based on 11 years,' which is the upper term 'for the voluntary manslaughter count,' . . . 'and nine years, four months on the seven separate child abuse counts.[']

" 'In exchange for my . . . stipulated 20 year, four month sentence, the district attorney's office promises the following:[']

" 'To dismiss outright count two that charges me with violating . . . section 273ab, paren a, close paren, which, if found true by a jury, subjects me to a possible,' 'to a possible indeterminate prison term of 25 years to life . . . and to stipulate to a determinate prison term of 20 years, four months.' "

After reading the addendum, on questioning defendant confirmed that there were no other agreements made in connection with his guilty plea and that nobody had threatened him or anyone close to him to accept the plea. The record shows the defendant next pleaded guilty as set forth in the plea agreement. The record further shows defendant admitted the factual basis for the plea in connection with count 1, in that he "intentionally committed an act of force against Brian Denell Magee Jr. (dob 10/25/2012) that directly caused his death. The natural consequences of [his] act were dangerous to human life and at the time that [he] acted [he] knew that the act was dangerous to human life and [he] deliberately acted with a conscious disregard for human life and [his] conduct was not justifiable or excusable."

As to the factual basis for the seven felony child abuse accounts, defendant admitted he "willfully inflicted unjustifiable physical pain on Brian Denell Magee Jr.

(dob 10/25/2012) on seven separate occasions under circumstances or conditions likely to produce great bodily injury. Furthermore, the seven separate acts of abuse did not involve reasonably disciplining the victim."

The record next shows both defense counsel and the prosecutor stipulated that defendant's 314-page preliminary hearing transcript provided the factual basis to support defendant's guilty plea.

In early May 2016, defendant filed a notice of appeal and a request for certificate of probable cause. The court denied the request, finding defendant had not shown "reasonable constitutional, jurisdictional, or other grounds for appeal relating to the legality of the proceedings" in connection with his guilty plea. In mid-May 2016, defendant filed an amended notice of appeal based on his sentence or other matters occurring after the plea. In support of his amended notice of appeal, defendant filed an amended request for certificate of probable cause in order to challenge the plea agreement. The amended request for certificate of probable cause also was denied.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), appointed counsel filed a brief on behalf of defendant setting forth the facts of the case and requesting we review the entire record. Further, appointed counsel has identified the following issues that "might arguably support the appeal" (*Anders v. California* (1967) 386 U.S. 738, 744 (*Anders*)): (1) whether there was a sufficient factual basis to support the guilty plea; and (2) whether defendant could challenge the sentence he received in exchange for his guilty plea.

We offered defendant the opportunity to file a brief on his own behalf, and he has not responded.

DISCUSSION

The *Anders* issues raised by appointed counsel requires us to examine section 1192.5. Specifically, when a "trial court takes a conditional plea of guilty . . . to an accusatory pleading charging a felony, under . . . section 1192.5 it must 'cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.' " "The purpose of the requirement," " we have said, "is to protect against the situation where the defendant, although he [or she] realizes what he [or she] has done, is not sufficiently skilled in law to recognize that his [or her] acts do not constitute the offense with which he is charged." " (*People v. French* (2008) 43 Cal.4th 36, 50.) In *People v. Holmes* (2004) 32 Cal.4th 432 (*Holmes*), we held the trial court can satisfy this requirement by inquiring of defense counsel regarding the factual basis of the plea, in which case, we said, 'it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, *preliminary hearing transcript*, probation report, grand jury transcript, or written plea agreement.' (*Id.* at p. 436, citing *People v. Wilkerson* (1992) 6 Cal.App.4th 1571, 1576–1579.)" (*People v. Palmer* (2013) 58 Cal.4th 110, 112–113 (*Palmer*), italics added & fn. omitted.)

The record shows in this case that both defense counsel and the prosecutor stipulated that the 314-page preliminary hearing transcript of July 26 and 29, 2013

provided a sufficient factual basis to support defendant's plea. (See *Palmer, supra*, 58 Cal.4th at pp. 112-113.) As noted by our high court, "[s]ection 1192.5 requires the trial court to make *an inquiry* to satisfy itself that there is a factual basis for a conditional plea of guilty or no contest. The purpose of the factual basis requirement is to help ensure that the constitutional standards of voluntariness and intelligence are met. (*Holmes, supra*, 32 Cal.4th at pp. 438–439.) In *Holmes* we observed that, although the statute requires the ' "inquiry to be made of defendant" (§ 1192.5),' a 'stipulation by counsel to the plea's factual basis is consistent with the legislative purpose of the statute. While defendant may not be in a position to recognize whether his acts do or do not " 'constitute the offense with which he is charged' " [citation], defense counsel is well suited to make such a determination.' (*Holmes, supra*, at p. 440, fn. 5.)" (*Id.* at p. 118.)

In light of *Palmer* and *Holmes*, on this record we conclude there was a sufficient factual basis to support defendant's guilty plea.

With respect to his sentencing, as noted defendant twice was unable to obtain a certificate of probable cause, such as would allow him to challenge the validity of his plea agreement. (§ 1237.5.) Because the sentence was an integral part of the plea agreement, as summarized *ante*, a challenge to the sentence is a challenge to the guilty plea, which requires a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 84.)

In any event, the record clearly shows defendant was repeatedly advised both in the plea form he initialed and signed and by the court during the hearing that in exchange

for his guilty plea he would be receiving the determinate sentence of 20 years four months, rather than face charges that carried indeterminate sentences of 25 years to life. The record further shows defense counsel advised defendant of, and defendant stated he understood, the sentence he would be receiving under the plea. We thus reject his challenge to the sentence.

Finally, a review of the record pursuant to *Wende, supra*, 25 Cal.3d 436 and *Anders, supra*, 386 U.S. 738, including the issues referred to by appellate counsel, has disclosed no reasonably arguable appellate issues.

DISPOSITION

The judgment of conviction is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.